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THE SUPREME COURT OF THE UNITED STATES

WILLIAM T. BANTON,

Petitioner

ROBERT E. KENNEDY, JR., et al.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition For Writ of Certiorari  
To The United States Court of Appeals  
For The Sixth Circuit

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QUESTIONS PRESENTED

1. Whether or not the Supreme Court of the United States lacks jurisdiction to entertain a petition for a writ of certiorari when the petitioner failed to file a notice of appeal to the Court of Appeals within thirty days of the District Court's ruling.

2. Whether or not this Court should review the decision of the lower court when the District Court had denied a motion to reconsider for lack of good cause where Petitioner had submitted no evidence or arguments to justify reconsideration.

3. Whether or not a District Court has the authority to set temporal deadlines for the filing of dispositive motions.

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## STATEMENT OF THE CASE

### A. Factual Background

During the early morning hours of October 27, 1981, Respondent, Robert E. Kennedy, Jr., was proceeding in his automobile along Pearl Road in Cleveland when he was stopped by two City of Cleveland police officers for having allegedly failed to obey a red light. During the arrest, officers John Riley and Raymond Offutt assaulted Kennedy. Other officers who subsequently arrived at the scene ignored Kennedy's complaints of pain. Upon arriving at the station, Kennedy was placed in a jail cell where he was again assaulted and verbally abused by Riley who repeatedly punched and kicked him while officer Offutt and another officer stood by. Thereafter, Kennedy was transported in the custody of Riley and Offutt to Cuyahoga County Metropolitan Hospital for examination and treatment. The officers caused him to be handcuffed during most of the hospital stay. During his stay at the hospital, Kennedy was twice assaulted by other police officers assigned to guard him, although he had done nothing to provoke the assaults.

Several hospital employees witnessed the beatings at the hospital. One beating occurred when Kennedy was handcuffed to a wheelchair while being transported from the X-ray department. The other beating occurred in an examination room. Each and every hospital employee indicated in their statements to the police that Kennedy did nothing to provoke the violence. Instead, he mostly cried and begged the officers to stop. Most of the hospital employees observed evidence indicating that at least two of the officers involved were intoxicated.

Two other officers, whose identities are unknown, threatened Kennedy, while at the hospital, that his family would be harmed or that his residence would be burned to the ground. Following Kennedy's release from custody, he went into a deep coma and was



hospitalized for eleven days as a result of the beatings. He continued to suffer headaches and other post-concussive symptoms. He lost his job and incurred extensive medical expenses. Kennedy's wife filed a complaint of police brutality with the Police Department asserting that her husband had been seriously injured as a result of police misconduct.

A post-assault cover-up conspiracy involving Petitioner Hanton and other police officials then ensued. Kennedy was charged with and prosecuted for a series of offenses including a traffic light violation, two assaults, resisting arrest, and possession of a concealed weapon, (a pocket knife used in his work).

The case was eventually assigned for investigation to Petitioner Hanton's special investigation unit, the Professional Conduct and Internal Review Unit (PCIR). PCIR concluded, in a seriously flawed investigation, that there was no police misconduct whatsoever.<sup>1</sup> This investigation was designed to cover up the truth of what actually occurred.

Petitioner Hanton, as Chief of Police, reviewed the Kennedy investigation conducted by PCIR and concluded that the police acted properly. He confirmed the conclusion that police procedures had not been violated.

Subsequently, a lengthy jury trial was conducted in Cleveland Municipal Court on the criminal charges brought against Kennedy. Although Respondent had requested discovery pursuant to the Ohio Rules of Criminal Procedure, he received none of the statements of the hospital witnesses that had been obtained by the police.

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1 As the District Court noted, PCIR investigator Wszelaki's testimony with respect to his internal investigation of the alleged beating of Kennedy at the hospital, was that the written statements of the challenged police officers were as a matter of policy taken to be truthful and worthy of belief in the face of contradictory evidence by civilian witnesses - even though the police officers refused to consent to face-to-face interviews. This was so despite the fact that the civilian witnesses, who offered testimony to the effect that Kennedy was beaten while handcuffed and seated in a wheel chair being escorted by hospital personnel, were questioned extensively in face-to-face interviews by Wszelaki who employed the "question and answer" method.

These statements had contradicted the police officers' testimony. At the close of the City's case, the presiding trial judge, upon motion of Kennedy, entered acquittals on the two assault charges and the charge of carrying a concealed weapon. Thereafter, in return for the Petitioner's no contest plea to the uncharged minor misdemeanor of disorderly conduct, the remaining charges were dismissed by the prosecution.

Respondents alleged in their complaint, inter alia, that Petitioner Hanton and other policy-making officials of the City established a policy making the discipline and prosecution of police officers for misconduct improbable. Respondents' complaint also alleged that Petitioner Hanton participated in the Kennedy cover-up and in a policy of tolerating the cover up of misconduct and encouraging misconduct by failing to provide adequate training and supervision of the officers and by failing to promulgate and enforce necessary rules of conduct. All of this resulted in serious physical harm to Respondent Robert Kennedy. Kennedy's wife, Joyce, sought damages for loss of consortium and companionship and also alleged that because of his injuries, she was compelled to care for her husband and was deprived of his services. Respondents contend that such policies, practices, and conduct violated the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and 42 USC Sec.s 1983, 1985 and 1986. Petitioner Hanton was sued in both his personal and official capacities.

#### B. Procedural Background

Petitioner Hanton appeared and answered. He raised, as a special defense, the claim that he "acted lawfully, with probable and reasonable cause, and in good faith." In addition, Chief Hanton specifically claimed that he was "immune from the damages claims asserted in the complaint."

The civil docket sheets in the district court reflect exten-

sive activity in the case between the January 10, 1983 filing of the answers and the entry upon the docket on August 27, 1984. That entry of the trial judge scheduled the case for trial on a standby basis for a two week period commencing December 3, 1984, and ordered that "all dispositive motions must be filed with the Court by October 15, 1984." Activity in the case is reflected by more than sixteen pages of docket continuation sheets from the date of filing the complaint on October 26, 1982 until August 27, 1984. A great deal of additional activity has transpired since August of 1984.

Numerous status calls were made by the court and both sides engaged in discovery by way of interrogatories, depositions and document requests. On November 1, 1984, after receiving permission to file beyond the deadline for dispositive motions, Petitioner Hanton, joined by several other defendants, moved for summary judgment. Hanton's statement of reasons was directed primarily to the alleged absence of any involvement by the individual defendants in the alleged misconduct and in the alleged absence of any evidence, following discovery, that there was a cover up by the Chief and others. Petitioner argued that he was, therefore, entitled to judgment as a matter of law for the failure of Respondents to produce any evidence of liability or to rebut any evidence of non-liability which had allegedly been assembled in the course of discovery or was contained in affidavits attached to the motion.

In an extensive opinion and order dated February 12, 1985, the District Court, having previously granted a motion for continuance of the scheduled December 1984 trial date, granted defense motions to dismiss Respondent Robert Kennedy's claims brought under 42 USC Sec.s 1985 and 1986. However, the motions for summary judgment were denied as to Hanton and others based upon the court's examination of the affidavits submitted, the entire record of the criminal proceedings against Kennedy in the

Cleveland Municipal Court, which had been filed and review of the written statements of many of the police officers and of the hospital employees and other documents. As to Chief Hanton, the District Court concluded that summary judgment was not warranted for at least two reasons:

- 1) The trier of fact could find, with respect to Respondent Kennedy's claims growing out of the assaults, that Petitioner Hanton's failure with respect to training and disciplining had a causal relationship to Kennedy's injuries; and,
- 2) The trier of fact could find, with respect to the post-assault cover up, that Petitioner Hanton was a party to the conspiracy. (See Petitioner's Petition, Appendix, A-19 to 20.)

After the denial of summary judgment, trial commenced in April of 1985. After eight days of trial, the District Judge on April 19, 1985, declared a mistrial based upon the court's determination from the evidence presented that the defense of both the City and Sergeant Wszelaki of the PCIR could not be properly conducted by a single counsel, actually Petitioner's counsel herein, in view of a conflict of interest between those two defendants. Following the mistrial, Petitioner's existing counsel continued in his representation of Chief Hanton and the City, but Officer Wszelaki thereafter obtained separate counsel and a further continuance of trial until October 7, 1985. The District Court set aside several weeks for the trial.

On September 24, 1985, Petitioner Hanton, without requesting further permission to extend the earlier November 1, 1984 deadline for dispositive motions, filed what he characterized as a "supplemental" motion for summary judgment, seeking to raise a claim of qualified immunity and requesting a stay of proceedings under the then recently decided case of Mitchell v Forsyth, \_\_\_ US \_\_\_, 105 S.Ct 2806 (1985). This was followed by an addendum in which he also sought to raise a claim of absolute immunity.

Following a hearing, the district court, in an opinion dated October 2, 1985, rejected Petitioner's motions finding no good

cause for reconsideration of the February 12, 1985 order denying  
summary judgment.<sup>2</sup> Petitioner Hanton and Defendant Wszelaki then  
pursued an appeal to the Sixth Circuit Court of Appeals. As part  
of that appeal, they obtained an interim stay which prevented the  
trial from going forward on October 7, 1985.

The Court of Appeals for the Sixth Circuit fully considered  
the issues raised before it by Petitioner (and Defendant  
Wszelaki). On July 30, 1986, the Court of Appeals issued a  
lengthy and detailed opinion affirming the District Court's or-  
ders and rejecting all of Petitioner's arguments. Petitioner  
subsequently filed a Petition for Re-Hearing. On August 27,  
1986, that petition was turned down. On November 25, 1986,  
Petitioner Hanton filed a Petition for Writ of Certiorari,<sup>3</sup> thus  
bringing the matter before this Court for its consideration.

#### SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to consider this case because,  
as the Sixth Circuit Court of Appeals ruled, Petitioner Hanton  
did not file a timely notice of appeal from the District Court  
ruling. Further, the issues Petitioner now raises are being  
raised for the first time in this Court.

The Sixth Circuit decision in this case does not conflict  
with the decision of any other circuit, nor does it conflict with  
any decision of this Court.

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2 The District Court technically ruled that Petitioner's motion  
was stricken from the record. The Court's reason for this ruling  
was that it found "no good cause shown for it to reconsider its  
February 12, 1985 order denying Hanton's motion for summary  
judgment..." (Petitioner's Petition, Appendix A-49) The Court of  
Appeals held that the District Court technically should have  
denied the motion rather than strike it from the record, but it  
treated the ruling as a denial and applied the same standards of  
review as if it were an outright denial.

3 Defendant Wszelaki, who had been the only other appellant in  
the most recent appeal to the Sixth Circuit, did not choose to  
seek certiorari.

Petitioner's underlying premise is not supported by the record. The District Court did not bar submission of Petitioner's eve of trial motions to reconsider because they were submitted beyond a previously set deadline. Rather, the Court considered and denied the motions because, as Petitioner's counsel admitted at the hearing, the motions raised no new facts or arguments. The Court, therefore, found that Petitioner failed to show good cause for it to reconsider its prior rulings.

Petitioner was made aware of Respondents' allegations concerning the deprivation of his rights under Brady v Maryland, 383 US 83 (1963) at least a year and a half before the District Court denied his summary judgment motion. Moreover, the Brady allegations were not the basis upon which the District Court denied summary judgment against Petitioner Hanton.

District Courts have authority to impose temporal deadlines for the filing of dispositive motions.

This case is not ripe for review because Petitioner Hanton will remain as a defendant in the trial even if this Court renders a ruling in his favor.

ARGUMENT: REASONS WHY THE PETITION FOR WRIT OF  
CERTIORARI SHOULD BE DENIED

I. THIS COURT LACKS JURISDICTION  
TO CONSIDER THIS CASE

A. Petitioner's Appeal to the Sixth Circuit Was Not Timely

Petitioner filed a Motion for Summary Judgment on November 1, 1984. The motion was denied on February 12, 1985. Petitioner filed his notice of appeal on October 3, 1985, more than 190 days after the order had issued.

Rule 4 of Federal Rules of Appellate Procedure requires that an appeal be filed within thirty days of the issuance of the order appealed. The Court of Appeals ruled that the petitioner

lost his right to appeal 30 days after February 12, 1985.

Further, the Court of Appeals ruled that Petitioner did not extend the time within which to appeal by filing his flurry of supplemental motions in September and October, 1985. These motions qualified neither as motions to "alter or amend" pursuant to Rule 59(e), Federal Rules of Civil Procedure which would have required filing within ten days, nor as motions for reconsideration.<sup>4</sup> Therefore, this Court is without jurisdiction to consider this petition.

It has long been held that a reviewing Court lacks jurisdiction to hear an appeal unless it is timely taken. Berman v United States, 378 US 530 (1964); United States v Robinson, 361 US 220 (1960). Timely notice is "mandatory and jurisdictional". Browder v Director, Dept. of Corrections of Illinois, 434 US 257 (1978). As stated in Williams v Treen, 671 F.2d 892, 895 (5th Cir., 1982):

Rule 4(a) of the Federal Rules of Appellate Procedure provides that notice of appeal shall be filed with the clerk of the district Court within 30 days after the date of entry of the judgment or order appealed from. This Court has consistently held that compliance with Rule 4(a) is a mandatory precondition to the existence of jurisdiction by the Appellate Courts. (citations omitted, emphasis added)

B. Petitioner Failed to Raise the Issues in the Lower Courts

These issues are not now appropriate for review because they were not raised or resolved in the lower Court. The general rule enunciated by this Court is that it should not decide issues that were not raised nor resolved in the lower court. Youakim v Miller, 425 U.S. 231, 234 (1976); California v Taylor, 353 U.S. 553, 557, n. 2 (1957). It is only in exceptional circumstances, not present herein, where this Court would review such questions. Duignana v United States, 274 U.S. 195, 200 (1927).

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4 As the Court of Appeals noted, Petitioner was obviously attempting to take advantage of the potential right to interlocutory appeal as provided by Mitchell v Forsyth, supra, and to avoid the claim that his appeal would be untimely.



The issues raised in the Petition were not issues in the Courts below, and were neither briefed nor argued. In fact, these issues are being squarely presented for the first time in the Petition for a Writ of Certiorari. Respondent submits that this Court should decline to review these questions which the parties herein would be arguing for the first time in this, the Court of last resort.

II. REVIEW OF THIS CASE IS NOT JUSTIFIED PURSUANT TO RULE 17.1 OF THE SUPREME COURT RULES

A. The Decision Appealed from Does Not Conflict With Decisions of Other Federal Court of Appeals.

Petitioner contends that the decision appealed from conflicts with the case of Manetas v International Petroleum Carriers, Inc., 541 F.2d 408 (3d Cir. 1976), and that this forms a basis for review pursuant to Rule 17.1 (a) of the Supreme Court Rules. Respondent submits, however, that such a conflict within the Circuits does not exist to the extent that would make review by this Court appropriate.

1. Manetas is Not Good Law

Manetas, supra, stands alone for the proposition presented by Petitioner. As noted by the Sixth Circuit in its opinion, there is ample and more recent authority in the circuits which support a District Court's power to control its docket notwithstanding the "any time" language of Rule 56, Federal Rules of Civil Procedure, particularly with respect to dealing with disruptive motions filed on the eve of trial. See Management Inv. v UMW, 610 F.2d 384, 389 (6th Cir. 1979); Eagle v American Tel. & Tel. Co., 769 F.2d 541, 548 (9th Cir., 1985); U.S. Dominator v Factory Ship Robert E. Resoff, 768 F.2d 1099, 1104 (9th Cir. 1985); United States v First Nat'l Bank of Circle, 652 F.2d 882,



886 n. 5 (9th Cir. 1981); Williams v Howard Johnson's Inc., 323 F.2d 102 (4th Cir. 1963). It is worthy to note, as well, that although it is a ten year old opinion Manetas, supra, has not been cited by any Court, including subsequent Third Circuit decisions<sup>5</sup>, for the proposition for which it is cited by Petitioner

2. "Manetas" is Distinguishable

In Manetas, supra, the District Court considered and ruled upon a defendant's summary judgment motion even though it was filed beyond a 45-day time limitation contained in a pre-trial order. The Court itself decided to rule upon the otherwise tardy summary judgment motion and, therefore, in effect, modified the time limitation of its pre-trial order. Further, the Manetas Court was not confronted with a disruptive motion filed on the eve of trial. When reviewing the case, the Third Circuit merely confirmed that the District Court had the authority to consider the motion.

In the instant case, the District Court also set a time limitation for the filing of dispositive motions. Petitioner filed his motion for summary judgment within that time limitation of November 1, 1984, and the motion was fully considered and denied. However, eight months after the denial and only 14 days before the re-trial was to begin, Petitioner filed a "Supplemental Motion for Summary Judgment". That supplemental motion, which is the subject of the Petition, was denied by the District Court which held that the Petitioner showed no good cause for it to reconsider its previous denial. The Court of Appeals affirmed for that reason and also noted that a District Court had the authority to set reasonable time limitations for the filing of dispositive motions.

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5 See In Re Paper Antitrust Litigation, 685 F.2d 810 (3rd Cir., 1982)

It is important to note, as well, that the Manetas Court did not have to consider the time delays and disruptiveness which confronted the District Court in the instant case, where there have been more than 450 separate docket entries, numerous motions filed for reconsideration by Petitioner's counsel and an aborted eight day jury trial caused by the conflict of interest presented by Petitioner's counsel. In addition, the Manetas motion was the first motion for summary judgment filed by the defendants, while the motion presented here for review was a Supplemental "rehash" of one previously denied.

The rationale for granting certiorari with respect to a conflict among the Circuits is to maintain uniformity in the application of federal law. Any possible conflict presented by these two cases is, at most, insignificant and not worthy of review in light of the unique factual situations here and the  
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unlikelihood of future recurrence.

3. Resolution of Any Alleged Conflict is Irrelevant to the Outcome of this Case

Finally, any resolution of the alleged "conflict" cited by Petitioner will be irrelevant to the actual outcome of this case. As noted above, the District Court denied the motion because it found no good cause to reconsider its previous ruling. The Sixth Circuit affirmed the denial for the following reasons:

- 1) Petitioner lost his right to appeal when he failed to file a notice of appeal within thirty days of the original order denying his first motion;
- 2) Petitioner's subsequent motions failed to extend the time to appeal because they were not timely filed within the ten-day period prescribed by Rule 59(e), Federal Rules of Civil Procedure; and
- 3) The District Court did not abuse its discretion in denying Petitioner's motion, even if viewed as a renewal of his previously denied motion for summary judgment, since Petitioner failed to submit any new facts, previously unavailable legal arguments, or good cause to excuse his delay.

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6 See Harlan, Manning the Dikes (1958), 13 Record NYC BA 541, 552.

- 4) It would be proper for the District Court to establish a time for filing motions challenging the sufficiency of the pleadings.

The issue raised in the Petition deals only with the last of these reasons. Where the resolution of a conflict, even if otherwise "clear", is irrelevant to the final outcome of the case, this Court should decline review. Sommerville v. United States, 376 U.S. 909 (1964).

B. The Decision of the Court of Appeals Below Does Not Conflict with Mitchell

Petitioner asserts in his Jurisdictional Statement that certiorari ought to be granted on the basis of Rule 17.1 (c) of the Supreme Court Rules because the United States Court of Appeals for the Sixth Circuit has decided a federal question in a way which is in conflict with Mitchell v. Forsyth, *supra*, (See p. 3 of the Petition). Petitioner never clearly articulates the basis for this assertion other than to state, in conclusory fashion, that "the acceptance of the District Court's rationale for refusing to consider the merits of Petitioner's claim of qualified immunity effectively deprived him of the right to the pretrial ruling and interlocutory appeal mandated by Mitchell v. Forsyth, *supra*." <sup>7</sup> (See p. 16 of the Petition.)

Respondent submits that the Sixth Circuit's decision in no way conflicts with Mitchell. In fact, it clearly and carefully follows its teachings. The Sixth Circuit merely reasoned that in order to perfect any right to appeal, including that deriving from Mitchell, the appellant must file a notice of appeal within thirty (30) days of the date of the decision appealed from. [See

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7 It must be noted that Petitioner has certainly taken full advantage of any right to an interlocutory appeal which Mitchell affords him. He filed an appeal, obtained a stay of the trial (at this point a 16 month delay) and received a thorough, albeit unfavorable, consideration of his appeal by the Sixth Circuit. Perhaps, Petitioner believes that Mitchell requires that all defendants appealing on an interlocutory basis are entitled to a favorable resolution of their appeal. Mitchell obviously does not stretch nearly that far.

e.g. Rule 4(a), Federal Rules of Appellate Procedure; Moorer v Griffin, 575 F.2d 87, 89 (6th Cir., 1978).]

Mitchell extends the right to seek an interlocutory appeal to circumstances wherein a summary judgment motion based upon grounds of qualified immunity has been denied. Nothing in Mitchell even remotely suggests that such an appeal is somehow not subject to the same time requirements that are applicable to all other appeals. The Court of Appeals simply applied the standard time requirements to this appeal. This conclusion in no way conflicts with Mitchell.

III. THE DISTRICT COURT DID NOT BAR  
SUBMISSION OF PETITIONER'S MOTIONS ON THE  
GROUND THAT THEY WERE SUBMITTED BEYOND A  
PREVIOUSLY SET DEADLINE, BUT INSTEAD FOUND  
NO GOOD CAUSE TO RECONSIDER ITS PRIOR  
ORDER DENYING SUMMARY JUDGMENT.

Petitioner premises his entire argument upon the inaccurate assertion that the District barred submission of his eve of trial motions because they were submitted beyond a previously set deadline. Review of the District Court's opinion reveals that, in fact, the District Court considered and denied Petitioner's renewal motion simply because he failed to show good cause, in the form of additional evidence or arguments, for the Court to reconsider its prior orders. (See Petitioner's Appendix, A-49) In fact, at the hearing on Petitioner's renewal motion, Petitioner's counsel admitted this fact:

THE COURT: Don't you, in essence, reargue the same grounds that were in your motions of November 1st by new case citations?

MR. BERGER: Your Honor, I don't think that they (sic) are actually any different underlying arguments. I think it's another view of saying the same argument..

Both the District Court and the Sixth Circuit relied on these admissions in reaching their decision. The Sixth Circuit, in

considering this issue, stated as follows:

Certainly renewal of such motions seems to us to be a matter best left to the sound discretion of the trial judge who is charged with the responsibility for managing his docket and insuring an expeditious processing of the litigation, whereas here no new facts or previously unavailable legal arguments were offered and no good cause has been shown to excuse the inordinate delay, it was not an abuse of discretion in our judgment for the trial judge to have denied the motions (See Petitioner's Supplemental Appendix, A-13.)

Petitioner's underlying premise is, therefore, not supported by the record.

IV. THE PREMISE OF PETITIONER'S SECOND  
QUESTION PRESENTED FOR REVIEW THAT HANTON'S  
SUMMARY JUDGMENT MOTION WAS DENIED ON THE  
BASIS OF RESPONDENTS' "BRADY" ALLEGATIONS  
IS AN INACCURATE REFLECTION OF THE RECORD.

Petitioner Hanton's premise that he could not timely file a summary judgment motion because he was unaware of his alleged immunity defense until the District Court articulated the Brady issue in its February 12, 1985 order is inaccurate.<sup>8</sup> Careful scrutiny of that order reveals that the District Court never even discussed the Brady issue when it resolved the pending summary judgment motion as it applied to Petitioner.<sup>9</sup>

Instead, the District Court articulated two separate grounds which it found to be sufficient to overcome summary judgment with

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8 Petitioner asserts he was not made aware of the Brady allegations until the District Court denied summary judgment on February 12, 1985. This assertion is demonstrably incorrect. The Brady allegations were previously discussed by Respondents as early as June 14, 1983, a year and a half before the District Court denied summary judgment in Plaintiffs' "Brief in Opposition to Motion of Defendants Joyce, Romph, and Wszelaki to Dismiss the claims Against them by Robert Kennedy" (at p.13). It was also discussed in even greater detail in "Plaintiffs' Consolidated Brief and Evidence in Response to Motions for Summary Judgment of Defendants' City of Cleveland, George Voinovich, William T. Hanton, and Frank Wszelaki; and of Defendant Mark Romph; and of Defendant Richard Brinzda" (at pp 69-70). In fact the District Court noted when it denied summary judgment that the defendants, including Petitioner, "scoff(ed) at the notion that the statements obtained by the Wszelaki-Romph investigation constitute(d) Brady material." (See Petition, Appendix, A-26)

9 Brady v Maryland, 383 US 83 (1963).

respect to Hanton:

- 1) The jury could find that "Hanton's alleged failures with respect to training and discipline had a causal connection to Kennedy's injuries suffered as a result of the alleged beatings" (of Kennedy); and
- 2) The jury could find that Hanton was a party to a post assault conspiracy designed to cover up the truth of the assaults. (See District Court's Opinion reproduced in Petitioner's Petition, Appendix A-20)<sup>10</sup>

Nowhere does the District Court analyze the Brady issue in the context of resolving Petitioner Hanton's summary judgment motion. The Brady issue is only discussed in the context of resolving the summary judgment motion of another defendant, Frank Wszelaki.<sup>11</sup> The resolution of that summary judgment motion is simply not before this Court since only Petitioner Hanton chose to file a Petition for Writ of Certiorari. Petitioner's arguments with regard to the Brady allegations are, thus, thoroughly irrelevant to the pending petition and no way warrant review by this Court.

V. THE SIXTH CIRCUIT WAS CORRECT IN STATING THAT DISTRICT COURTS HAVE THE AUTHORITY TO SET TEMPORAL DEADLINES FOR THE FILING OF DISPOSITIVE MOTIONS.

In the instant case, Petitioner contends that a District Court can never impose filing deadlines for summary judgment motions because Rule 56, Federal Rules of Civil Procedure, provides that such motions may be filed "at any time." As noted, supra, Petitioner's motions were not denied by the District Court

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10 It is instructive that Petitioner clearly recognized these two grounds to be the only basis for the District Court's denial of summary judgment against him in his "Application for Clarification of February 12, 1985 Order". There was absolutely no mention of the Brady allegations at all in the Application for Clarification insofar as they related to the claims against Petitioner Hanton. Yet, the Petition for Certiorari is based on the inaccurate assertion that the District Court denied summary judgment against Petitioner Hanton due to its view of the Brady issue.

11 Perhaps, counsel for Petitioner is confused because he also represented Defendant Wszelaki. However, after a conflict of interest became apparent in the midst of trial a mistrial was declared and, Wszelaki chose to obtain separate counsel.

for that reason. Nonetheless, Respondents submit that a district court does have the authority to set reasonable time limitations for the submission of summary judgment motions filed on the eve of trial although Rule 56(b) states that a defendant may move for summary judgment "at any time." The Sixth Circuit so held. Respondents turn now to a discussion of a District Court's authority in that context.

A. A District Court Has the Inherent Right to Control Its Own Docket.

Federal district courts have the inherent right to control their own dockets (including the right to set motion deadlines) in order to facilitate the administration of justice, provided such control is not exercised in an arbitrary or capricious manner. As the Third Circuit Court of Appeals said in In Re: Paper Antitrust Litigation, 685 F.2d 810, 817, (3rd Cir. 1982):

Matters of docket control and conduct of discovery are committed to the sound discretion of the district court... We will not interfere with a trial court's control of the docket except upon the clearest showing the procedures have resulted in actual and substantial prejudice to the complaining litigant. (citations omitted)

This Court has recently upheld the inherent right of federal courts to enact procedural rules to govern the management of litigation based upon sound considerations of judicial economy. See Thomas v Arn, \_\_US\_\_, 106 S.Ct.466 (1986).

B. Rule 16 of Federal Rules of Civil Procedure Gives Explicit Authority to District Courts to Issue Pretrial Orders That Include Filing Deadlines.

Rule 16 of the Federal Rules of Civil Procedure allows a district court to issue pretrial orders which control discovery, set filing deadlines, limit the issues and, in general, control the subsequent course of the case. The purpose of such orders is to secure the just, speedy and inexpensive determination of cases. Courts have uniformly required that such orders be honored and strictly enforced, to the point of excluding contentions and



evidence not covered by such orders, unless modified. See 3 Moore's Federal Practice, 16.19 pp. 16-42 to 16-46; 6 Wright & Miller, Federal Practice and Procedure, 5152.7 pp. 605-07; United States v First National Bank of Circle, 652 F.2d 852 (9th Cir., 1981); Eagle v AT&T, 769 F.2d 541 (9th Cir., 1982).

In the instant case, the District Judge issued a pretrial order covering a wide range of issues, including a filing deadline for dispositive motions. Petitioner Hanton never sought leave of court requesting modification of the order, nor was good cause ever shown to modify the deadline. The order was, in fact, never modified. The Sixth Circuit was correct in noting that District Courts have that authority.

C. Motions for Summary Judgment Filed on the Eve of Trial, With No Opportunity for Opposing Party to Respond, Are Properly Denied.

Rule 56(c) of the Federal Rules of Civil Procedure provides that motions for summary judgment must be served on the opposing party ten (10) days before the time fixed for the hearing in order to give the opposing party the opportunity to respond to the motion. This ten (10) day advance notice provision has been strictly enforced by the courts to the point of denying otherwise warranted motions filed on the eve of trial with no opportunity for the opposing party to respond. Winbourne v Eastern Air Lines, Inc., 632 F.2d 219 (4th Cir., 1980).

Where, as here, the motions are filed on the eve of trial, the non-moving party is deprived of any opportunity to fully respond and the Court is deprived of any opportunity for full consideration of the motions. The only available option left to the Court under those circumstances would be to postpone the trial. This scenario would likely lead to a serious erosion of judicial economy.



D. The Unique Nature of the Rights Granted in "Mitchell" Require Filing Deadlines in Order to Prevent Abuse of the Appeal Process and to Promote Judicial Economy.

This Court has held that public officials may be entitled to immunity (either qualified or absolute) both from liability and trial in certain situations, and that part of the right to immunity includes the right to immediately appeal adverse rulings on summary judgment which involve immunity claims. Such appeals obviously can create havoc with a court's docket and cause inconvenience and delay in the proceedings. Further, precious judicial resources can be wasted by scheduling and preparing for trial only to be thwarted by a last minute interlocutory appeal.

In order to protect the rights granted in Mitchell while at the same time promoting judicial economy and preventing abuse of the appeal process, it is necessary for district courts to set filing deadlines for motions. These must be set far enough in advance of trial so that an appeal can be taken in an orderly fashion prior to the commitment of judicial resources. As the Sixth Circuit held:

The quid pro quo is obvious: in exchange for the defendant's right to interrupt the judicial process, the court may expect a reasonable modicum of diligence in the exercise of that right.

The case at bar is a good example of the potential for abuse of the appeal process and the reason why the setting of deadlines is important in protecting the rights granted under Mitchell.

VI. CERTIORARI IS NOT WARRANTED IN THIS CASE BECAUSE PETITIONER CANNOT AVOID TRIAL BY VIRTUE OF HIS DEFECTIVE SUMMARY JUDGMENT MOTIONS.

This case is not ripe for review by this Court because even a favorable ruling on the issues presented would not permit Petitioner to avoid standing trial.

A. At Best, Petitioner Has Sought to Raise a Qualified Immunity Defense to Only One of Respondents' Many Claims Against Him.

Petitioner would have this Court believe that there is only one claim against him, namely the deprivation of Respondent's "Brady rights." In reality, there are many other significant claims asserted against Petitioner for which he does not even assert a qualified immunity defense and/or for which none is available including:

- Failure to properly manage the police department, promulgate and institute rules and regulations governing the conduct of police officers and the investigation of police misconduct;
- Failure to properly supervise, train, discipline and control the behavior of the police officers, thereby creating an attitude of complacency within the police force with regard to misconduct and brutality, and permitting officers to commit misconduct to remain in a position to do so;
- Ratification and acquiescence to the misconduct of police officers, including those in the instant case;
- Cover up of police misconduct;
- Conflict of interest and participation in the defenses and indemnity of the police officers, city, and city officials, in the prosecution of the victims of police officers, and in the investigation of police misconduct, all of which leads to a manipulation and cover-up of police misconduct resulting in complacency among the officers. 12

Petitioner would have this Court believe that a favorable ruling on the issue of immunity would effectively dismiss him from the case. Given all the other claims against him, Petitioner will remain a defendant in this case notwithstanding a favorable ruling on the issue of immunity.

B. Petitioner Submitted no Qualified Immunity Claim in Defense of the "Brady" Allegations. Nor Could He Have Done So Since "Brady" Has Been Clearly Established Law Since 1963.

The current test for determining whether or not a defendant,

12 This list is not meant to be exhaustive; see Complaint and Amended Complaint.

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who is entitled to raise a claim of qualified immunity, has successfully proven that defense was enunciated by this Court in Harlow v Fitzgerald, 457 US 800 (1982):

... Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. (citations omitted) Id., at 818.

On the other hand:

If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct... Id., at 818. (emphasis added)

Review of Petitioner's summary judgment motions and attached documents reveals that Petitioner did not argue that the laws that he was alleged to have violated were not clearly established. He did not argue that recent court decisions have modified the law from what it was when the acts and omissions complained of occurred. He made no such claim whatsoever in the affidavits attached to his November, 1984 summary judgment motions or the briefs accompanying them. He never asserted that he did not objectively know of the Constitution's requirement to turn over potentially exculpatory evidence. Of course, this would be a rather difficult assertion to make since Brady made that requirement clearly established law as of 1963.

Instead, the issues presented by Petitioner in defense of the claims against him, though categorized by Petitioner under the rubric of qualified immunity, were not really immunity defenses.

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13 Although Petitioner now claims entitlement to a defense of qualified immunity which would require that he have official discretion and that he acted within the scope of that discretion, [Williams v Treen, 671 F.2d 892, 896-7, (5th Cir., 1982)] he previously claimed that there was no evidence that he was a "decision maker for the City of Cleveland in any relevant respect." (p. 16 of Defendants' Reply Brief in Support of Motion for Reconsideration). Of course, he cannot have it both ways.

He raised factual questions as to causation and as to whether he participated in the conduct that gave rise to Respondents' damages. He premised his assertions upon his view of the facts, claiming that he caused no cognizable injuries to Respondents. Although Petitioner now seeks to call this defense "qualified immunity," it clearly is not.<sup>14</sup>

C. Immunity Is a Defense Only to Personal Capacity Rather than Official Capacity Claims.

It is beyond dispute that the defenses of absolute immunity and qualified immunity are available only to claims against officials in their personal capacities rather than in their official capacities. Kentucky v Graham, \_\_US\_\_, 105 S.Ct.3099 (1985); Swann v City of Independence, 445 US 622 (1980).

Petitioner is attempting to suggest that a finding in his favor on the issue of qualified immunity will remove him from this suit. In fact, however, a finding of absolute or qualified immunity would, at best, only resolve one of the personal, and none of the official capacity claims. It would do nothing to afford Petitioner the right recognized in Mitchell "not to stand trial under certain circumstances."

D. The Lower Courts' Denial of Petitioner's Summary Judgment Motions Premised Upon Claimed Defenses of Qualified Immunity Was Fully Appropriate in That Petitioner Submitted No Rule 56 Evidence Which in Any Way Invoked Qualified Immunity.

Petitioner produced absolutely no Rule 56 evidence which would in any way support his claimed immunity defense. A thorough examination of Petitioner's motions reveals the utter lack of any such Rule 56 evidence. In fact, Petitioner's counsel

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14 Petitioner intentionally mischaracterized his defense as "qualified immunity" because it was the only vehicle available to him with which to take advantage of Mitchell. This strategy was recognized by the Sixth Circuit and the District Court. (See Petitioner's Petition, Appendix, A-44 - 45; Petitioner's Supplemental Appendix, A-12.) In reality, Mitchell is in no way implicated in Petitioner's defense. Petitioner's Petition, Appendix, A-44 - 45; Petitioner's Supplemental Appendix, A-12.) In reality, Mitchell is in no way implicated by Petitioner.

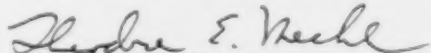
admitted at the hearing on his "supplemental motions" that he was presenting no new evidence or arguments that were not included in his original summary judgment motion.

Petitioner now admits that nothing in his original summary judgment motion invoked the doctrine of qualified immunity. (See p. 11, n. 9 of Petitioner's Petition.) Obviously, if the Rule 56 evidence attached to the original summary judgment motion did not even raise an immunity defense, then that same evidence cannot later be sufficient to support a grant of summary judgment based upon a claim of immunity. Thus, review by this Court is unwarranted since no Rule 56 immunity evidence was ever presented.

#### CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



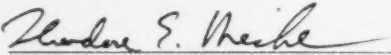
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SERVICE

A copy of the foregoing was sent by first class United States mail, postage prepaid on this 24<sup>th</sup> day of January, 1987 to Stuart Friedman, Irving Berger, Marilyn Zack and Nick Tomino at City Hall Room 106, 601 Lakeside Avenue, Cleveland, Ohio 44113; Paul Lefkowitz at The Halle Building, 1228 Euclid Avenue, Suite 900, Cleveland, Ohio 44115-1802; and to Charles Riehl and Mary Balasz, 1215 Terminal Tower, Cleveland, Ohio 44113.

  
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